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Supreme Court of the United States

OCTOBER TERM, 1942.

No. 503.

RAU CONSTRUCTION COMPANY, A CORPORATION,
PETITIONER,

VS.

PHILLIPS PETROLEUM COMPANY, A CORPORATION,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

PETITIONER'S PETITION FOR REHEARING.

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PETITION FOR REHEARING.

1. Under Rule 33, rehearing is respectfully prayed of the denial on December 7, 1942, of petition for writ of certiorari to review the decision of the Eighth Circuit, reported 130 F. 2d 499 (R. 1987), which reversed *quantum meruit* judgment of $140,582.53. Lawful trial Findings either have no more substance than dreams, or, if they possess the dignity and virtue declared by both Rules and decisions, they should be accorded that effect.

2. Coordinately created with rules of judicial administration is the duty to require their consistent observance by subordinate authority. The ultimate responsi-

bility rests here for the violation and evasion of the Rules and decisions promulgated by this Court to govern on appeal. Equal protection of laws must be implemented by enforcement, or uniform substantive rights duly invoked (R. 1998; Petition for Writ, pp. 11, 22), although secured by mandate of the sovereign people, have no reality. By solemn declarations, this Court has decreed that a Circuit Court of Appeals is without authority to weigh evidence or to make its own findings of fact and that lawful trial Findings are binding on appeal unless set aside under the prescribed conditions. The petition for the writ, perhaps too mildly, pointed out the repudiation of petitioner's fundamental rights, by the suppression without consideration of too many lawfully supported trial Findings for mere coincidence and the usurpation of authority in substituting unsupported fiction for binding facts. Attention is plainly directed thereto, without reservation or exaggeration, not as a pleasant but as a mandatory duty. The obligation is common to both Bench and Bar to maintain uniformity in the administration of justice, and to guard it from navigating in the murky waters of the River of Doubt.

3. The facts are publicly recorded in the trial Findings (R. 1898), and printed record. They are too inevitably clear to shift responsibility. Petitioner makes its final appeal for its secured rights, before accepting destruction to join the spectral shades of its denied inherent rights, as the loss exceeds its capital and surplus (R. 73). Before exclaiming: "*Ubi jus incertum, ibi jus nullum; vale, morituri te salutamus,*" and reflecting on Luke, 23:28, "Weep not for me," etc., it confidently believes that review may not be denied if this Court, in common fairness to petitioner (and to the trial court, which faithfully and correctly discharged its duties), will but consider Finding 23 (in R. Vol. 6, p. 1914), and the preceding Finding 22. We do not believe the request to read that much of the actual Findings is an imposition, despite the recognized

burdens of the Court. While the record is extensive, the issues and facts are not complicated.

4. In directing reversal of $140,582.53 and judgment entry for $2,010.23 under Phillips' judgment consent, the opinion (R. 1993) rests on usurped authority in finding unsupported double untruths as facts. It declares that the evidence showed no error in Phillips' non-existent final statement of $2,010.23, prepared before suit. Phillips never so claimed, nor does it now seek to sustain it. Its brief here (p. 12) admits the final statement was for $1,-785.51, which was returned refused. The aggregate allowance of $4,775.34 for overtime, fine grading and tooled edging, all additional work items required outside of any possible express contract terms, recovered under Complaint, Pars. 13 and 14 (R. 2, 3), fixed by Findings 23, 28 and 29 (R. 1914, 1919, 1920), which were wholly suppressed without mention or consideration and of $35,597.16 allowed for concrete forms and panels built according to issued plans and not paid for, conclusively show the error of these unauthorized appeal Findings. These items were all recoverable, whether or not the alleged contracts, pleaded as a defense, were held *valid or invalid.* Finding 28 determines that Phillips even admitted part of the sum allowed for fine grading. Overtime of $4,392.20 was found by Finding 23 to have been arbitrarily required for Phillips' convenience, after its definite contrary promises and its receipt of notices of June 1 and June 27th (R. 896, 1121) that there was no contract right therefor and payment would be required. Contract, Par. 29 (R. 12), denies the right to require overtime and prohibits even voluntary overtime without Phillips' Engineers' consent. Attempted denial of authority of Phillips' Engineers ordered to expedite the work was the only overtime defense offered. That fact; their authority and the compulsion exerted to procure overtime and every other item reversed, by the threats made wholly without contract right and contrary to the terms thereof, to take over all material, machinery

and equipment, by excluding the Rau Company from Phillips' fenced and guarded premises, and to withhold all payments, is established by Findings 23, 20 and 24 (R. 1910, 1914, 1917). All of these Findings and Finding 32 (R. 1921), determining that there was *nothing in the entire evidence upon which to predicate a waiver, estoppel or ratification* by Rau, were concealed and suppressed without mention or consideration thereof in any way. It stands lawfully unchallenged by these evaded Findings, which were *not set aside,* that it was impractical for Rau to discontinue the work, but that it *was obliged by the necessities of the situation to proceed, regardless of the lack of justification of Phillips' demands and the additional expense caused thereby.* Suppressed Finding 1, R. 1898, determined that Phillips' judgment offer included $230.60 for *overtime* (cf. $4,392.20 overtime due, fixed by Finding 23), and $1,165.67 for concrete forms and that the original answer admitted $2,108.58, or $98.30 more than the non-existent statement before suit, upon which the direction of reversal rests.

5. It was conceded nothing was paid on any item in suit. The aggregate indebtedness is recapitulated in suppressed Finding 31, R. 1920. Overtime and concrete forms were invoiced September 16th (R. 1136, 1139). The then known cross section differences were also called to Phillips' attention by letter (R. 1138, Ex. 30), all admittedly received. Phillips' statement here (Brief, p. 2) that no claim was made until after completion on November 14, 1939, is denied by the record. The unauthorized, unsupported appeal finding of alleged accord (R. 1993) or compromise, are not only impossible, but deny contract, Par. 35, R. 15, which specifies the payment due date, for extra and additional work as thirty days after acceptance, or December 14th. The last payment accepted was December 3rd, for money concededly due (not including anything on account of any item in suit), paid conditionally to discharge bills due, to protect Phillips' property from lien

claims. Rau did not meet deceit with deceit, but faithfully discharged its every obligation. It relied on the courts for redress for the duress, fraud, concealment and oppression practiced. The lawful, binding facts, fixed by an able trial court who determined and declared them from the testimony of witnesses before him, whose acts, conduct and intent were truly weighed and measured, were concealed, evaded and suppressed. Fiction was substituted for fact, by usurped jurisdiction. Rau was stripped of its entire resources, with costs of $4,813.25 assessed for its temerity in presenting binding established facts showing the virtual state of peonage which was enforced within Phillips' guarded fence. Examples of the power of Phillips were applied at intervals, that the power could not be forgotten. Automobiles of Rau's officials and employees were arbitrarily excluded, while other contractors were admitted, even while night work was wrongfully compelled, causing injury to one employee forced to walk in the dark (R. 886, 1692-3). Progress was delayed but at Rau's expense. That a Union Representative might enter Phillips' sacred confines in some Rau automobile was the only excuse ever given. The actual reason may be inferred from the facts fixed by Findings 20 to 25, R. 1910-1917. No covenant to "abandon all hope, ye who enter here," was expressed in any contract—either upon entering Phillips' fence, or any court.

6. Correction of the unwarranted errors and fiction was denied on prayer for rehearing (R. 2001), obviously because the facts fixed by Finding 23 for overtime of $4,392.20, could not be answered, denied nor set aside. If mentioned or recognized at all, then, automatically, the entire opinion would disintegrate, because the fictions upon which the appeal findings of "opinions but no fraud"; "waiver of fraud"; "no abandonment nor breach" and "no error in Phillips' nonexistent statement," could not survive. Findings 20 to 25, R. 1910-1917, could no longer be concealed. Every fiction upon which each conclusion of the opinion rested would wither in the clear light of unsup-

pressed truth. Judgment for $88,481.50 for cross section differences (Findings 26, 27, R. 1917) could not then possibly be reversed. Recognition of Finding 1, that the judgment offer included $1,165.67 offered for concrete forms would not permit denial of the facts fixed by Finding 22, R. 1912, last paragraph, quoting Phillips' inter-company letter, that $472 thereof was offered for *loss of re-use of forms*. The fallacy of the extra-jurisdictional appeal finding that nothing in the conduct of the parties nor in the words of their agreement, justified the allowance for *loss of re-use of forms* would have to be confessed. It could not be denied that the allowance was made under Complaint, Par. 10, R. 3, for changes made in concrete forms, form panels and form sets, requiring refabrication and expense in changing them, per itemized statement. It would stand confessed that Finding 22, R. 1911, establishes the truth of Exhibit 5 (R. 295), and fixes as fact that 53,419.5 square feet of forms were built exactly according to issued plans, but were never paid for and (R. 1914), absent the oral agreement of ten cents per foot for both forms and panels, Rau was entitled to 15.4¢ per foot therefor instead of the 10¢ allowed. Denial could not be made of trial Finding 22, that Phillips produced no record of form losses, although its engineers were ordered to keep a record, and that payment was to be made under contract, Par. 35, R. 15, thirty days after completion. The judgment offer was based alone on unsupported memory. The opinion accepts it in preference to facts. The misstatement of contract, Par. 5, R. 6, would have to be corrected, to say that while it permitted changes in plans, it concurrently fixed the liability to pay for the work caused by changes or alterations. The so-called supplemental agreement, as it states, merely fixed a price for part of that conceded liability, but the substantive right of recovery arose because the alleged contract *did not exclude but recognized liability* for the extra work caused by plan changes and alterations. Affirmance of the $35,597.16 would have to follow, because

the finding that Phillips paid nothing whatever for any forms or form panels built according to plans, when concrete could not be poured therein, because of the 215 subsequent changes made in plans after issue, all as fixed and found to be admitted by its Chief Engineer, could no longer be suppressed. Reversal for Phillips under usurped authority, with fiction replacing fact, apparently was deemed more important than truth. Justice is mythical if there may be denial of the fundamental right of affirmance under the lawfully established facts. Rules and decisions are truly no more than "scraps of paper."

7. The denial of fraud on appeal (Opinion (2), R. 1989) is based *only on a fact finding,* made without authority. The Complaint charged (R. 1-5) and Findings 5 to 15, R. 1900-1906, established fraud and every element. The answer (R. 61-68) admitted the authorized supplying of an inaccurate "cross section" and inaccurate information, after notice that the information required for contracting was not otherwise obtainable. It pleaded in avoidance that all information given was based on estimate and guess; that Mr. Rau and plaintiff knew thereof and did not rely thereon. Under the decisions of this Court from its earliest days, the fraud issue was a fact question. The opinion conceals the binding facts that petitioner was without that knowledge; that it relied upon and was entitled to rely on the accuracy of the cross section and information given; that the information was solely known to Phillips, who deceived plaintiff by information given and withheld, knowing that it was untrue and relied upon; that it was material and so known to Phillips and caused damage. The trial fraud findings are evaded but not discussed, clearly because they firmly establish that the information was given and relied upon as representations of fact and not as opinions or expectations. The facts and both Missouri and Texas law, were denied on appeal. The trial findings resolved the facts against Phillips. They were not and could not be set aside because not supported or because clearly

erroneous. The decision usurped authority in making an independent, contrary Finding, despite evidence, trial Findings and contract terms. It suppressed and concealed that Phillips, by its authorized engineer, supplied false information and a false engineering "cross-section" to falsely depict "the general conditions of the contract," *which were expressly made part of the contract, as fully as if thereto attached or therein repeated,* by contract, Par. 42 (R. 17).

8. The appeal findings of certainty of the subject matter, not only conceal and suppress the facts, but misrepresent the reasons assigned by the trial court therefor. The opinion (R. 1988, sub. 1), contradicts Findings 16, 17 and 18 (R. 1906-1909), in asserting that the conviction of the trial court of "no meeting of minds on the contract subject matter of the work" was based on the fact that the dimension and sizes of units were unknown. The trial Findings clearly establish the ultimate finding was made on the facts found that there was no method supplied by the "contract" to determine *what concrete work* was included or excluded. Phillips did not know and it was an obvious fact that plaintiff could not know. It was found that contract, Par. 1 (R. 5), specified "concrete work" for the refinery extension and polymerization "program," but that concurrent "program" concrete work was carried on by Phillips and other "program" concrete was built by others, before and after plaintiff left. Phillips even hired Rau's employees away to carry on the "program" concrete work (R. 1538-39). Unit 19 work by Rau was stopped, because it was not scheduled until the following January (R. 1642, 1620). If the plans as issued (with concurrent false promises that later plans for large items would bring the job up to representations relied upon) could properly be held to supply the original uncertainty of subject matter, as the opinion holds, the binding facts concealed destroy the ruling. The so determined "certainty" became highly uncertain by the 215 changes in plan made after first issue (Finding 17, R.

1908). The later "finding" that the right to change plans was reserved, suppressed the provision requiring payment for the extra work so caused. Such an unrestricted right effectually would create complete uncertainty of the subject matter of a construction contract.

9. Findings of abandonment or breach were thrust aside, in defiance of the facts clearly established by suppressed Findings 20, 23, 24 and 33 (R. 1910-1921). The appeal findings made on waiver of fraud, accord and compromise are not only without authority, but are denied by the facts fixed by binding findings, which could not be lawfully set aside. Such attempt was not undertaken, but evasion, suppression and fiction were relied upon to conceal and replace them.

10. The issue of which court has jurisdiction to determine facts is presented as concisely and clearly as ability permits. Equal justice for all, with special privilege to none, is an essential of democracy. If Phillips may profit by special privilege, is such privilege limited to petroleum companies? Inequality of administration strikes at the root of justice. The careful labors of an able trial court are indeed "unhonored and unsung," if the reasons guiding it may be misrepresented and forever recorded in the reports, and if supported truth established and fixed according to law, may be distorted, suppressed, concealed and replaced by unauthorized fiction, to effect an unwarranted reversal. The facts are inescapable, as a casual reference to the trial Findings will show. That every trial Finding is supported by substantial evidence, counsel certifies from an intimate knowledge of the trial and record. Phillips' evidence virtually supports all, except those on the amount of recovery for each item. Its Engineers checked the data before trial on every recovered item. No errors were shown.

11. Certainty of justice is an ideal for which this Court has long labored. We do not believe that review has ever been denied where there has been a fair appearance that

it had not been attained. If counsel has discharged his duty in reflecting the facts, as he believes has been done, a review should follow as of course, with correction and admonition for non-compliance with authoritative rules of judicial administration.

MAURICE J. O'SULLIVAN,
Counsel for Petitioner.

Certificate of Counsel.

Maurice J. O'Sullivan, counsel for petitioner, Rau Construction Company, certifies that the foregoing petition for rehearing is presented in good faith and not for delay, and because counsel firmly believes that the petitioner is entitled to a rehearing as a matter of right to accomplish justice in accordance with the accepted course of judicial proceedings.

MAURICE J. O'SULLIVAN,
Counsel for Petitioner.